IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1556

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, the Public Service Commission of the State of New York (New York), respectfully prays that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on January 27, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals of the District of Columbia Circuit of January 27, 1976 from which review is sought has not yet been reported. It is set

out as Appendix A to the Petition for a Writ of Certiorari to review the same opinion of the Court of Appeals being simultaneously filed in *Associated Gas Distributors* v. *Federal Power Commission*. The orders of the Federal Power Commission of April 16, 1973 and June 21, 1973, in *Mobil Oil Corporation, et al.* which are in issue in this proceeding are reported at 49 F.P.C. 1009 (1973) and 49 F.P.C. 1411 (1973) respectively. The Commission's orders in *Continental Oil Company, et al.* of April 27, 1973 and June 1, 1973 are not reported. All of these Commission orders are set out as Appendix B to the Associated Gas Distributors (AGD) petition.

JURISDICTION

The opinion and judgment of the Court below was entered on January 27, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission properly authorized producers of natural gas to charge the higher new gas rate for flowing gas sales when their initial sales contracts expired and they entered into replacement contracts, in the absence of any showing in the rate increase proceedings that any of the increased revenues would be devoted to additional gas search efforts for the interstate market, on the basis of a policy statement in a rule making proceeding which also provided no factual predicate for the Commission's action.

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Natural Gas Act 15 U.S.C. § 717 *et seq.*, are set out as Appendix C to the Appendix to the AGD Petition for Certiorari.

STATEMENT OF THE CASE

This case involves consolidated actions to review orders of the Federal Power Commission in two proceedings which had the effect of authorizing a number of producers to charge the area new gas rate for sales of flowing gas from the Texas Gulf Coast and Other Southwest production areas solely because their initial contracts had expired and the producers had entered into new contracts with the pipelines calling for similar service at a higher rate. The first of these two sets of proceedings, *Mobil Oil Corporation (Operator)*, Docket Nos. CI73-450 and CI73-451, 49 F.P.C. 1009, 1411 (1973), involves an abandonment of a sale by Mobil to Shell Oil Company for resale to Texas Eastern Transmission Corporation at the old gas rate for the Texas Gulf Coast Area, and simultaneous authorization of a "new" sale of the same gas by Mobil to Texas Eastern at the new gas rate for the area. The Public Service Commission of the State of New York (New York) did not participate in this proceeding at the Commission level. AGD's petition for review of the Commission's action therein was consolidated by the Court of Appeals for argument and decision with review actions brought by AGD and New York from the orders of the Commission of April 27, 1973 and June 1, 1973 in *Continental Oil Company, et al.*, FPC Gas Rate Schedule No. 3, *et al.*, which approved rate increases filed by Continental, Phillips Petroleum Company and Getty Oil Company which, on the basis of replacement contracts, permitted them to charge the area new gas rate for sales of flowing gas which had previously been limited to the applicable area old gas rates.

The Public Service Commission of the State of New York is a regulatory body established under the laws of the State of New York having jurisdiction *inter alia* over the operations of distributors of natural gas at

retail in the state. Almost all of the gas sold in the state is acquired by those distributors from interstate pipelines subject to the jurisdiction of the Federal Power Commission (Commission), who in turn secure most of their gas directly or indirectly from independent producers pursuant to sales regulated by the Commission. Consequently, New York, in order to protect the interests of gas consumers in its state, has for a number of years found it necessary to participate actively in Commission proceedings involving both the pipelines serving the state and looking towards the fixing of just and reasonable area or national rates for producer sales to the pipelines.

A. The Administrative Background

Since the initiation of group rate making in the *Permian Basin Area Rate Proceeding*, 34 F.P.C. 159 (1965), affirmed *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), the Commission has consistently fixed two sets of just and reasonable rate ceilings, one for flowing gas and another higher level for new gas. The flowing gas rate was and is established essentially to reflect the average historical costs of existing production, but the new gas rates have been fixed on a current cost basis intended to encourage an enhanced gas search effort by the producers. As the Commission found in its *Permian* opinion, 34 F.P.C. at 186, "the two-price system . . . provides a price for the future related to current and future costs and payable only to producers who discover gas-well gas and dedicate their discoveries to the interstate market" while "avoiding windfalls to those producers who acquired and sold gas under lower cost conditions." See also *Permian*, *supra*, 390 U.S. at 798.

The dividing line between new and old gas was normally fixed in the area proceedings at some date around the commencement of the proceeding, and, as a matter of convenience, *Permian* and the subsequent area rate

proceedings applied these dates to individual sales on the basis of whether or not the sales contract had been made before or after the date chosen. See 34 F.P.C. at 189. The Commission recognized in its original *Permian* opinion, however, that overly rigid adherence to contract date vintaging could be detrimental to the public interest. Accordingly it instituted therein (34 F.P.C. at 1068-1072) a separate proceeding leading to Opinion No. 567, *Hugoton-Anadarko Area Rate Proceeding (Committed Acreage)*, 42 F.P.C. 727 (1962), in which it specified that all gas produced from deeper drilling in previously committed acreage would secure the new gas price, regardless of the date of the underlying contracts governing such sales.

This concept was further expanded in 1972 when the Commission in establishing its *Optional Procedure for Certificating New Producer Sales of Natural Gas*, 48 F.P.C. 218 (1972), *affirmed* in major part in *Moss* v. *FPC*, 502 F.2d 461 (D.C. Cir., 1974) and as to the remainder by this Court in *FPC* v. *Moss*, Case No. 74-883, decided March 3, 1976, made its procedure for seeking rates in excess of the established ceilings for new sales of gas applicable to all *wells* drilled after April 6, 1972, regardless of whether the acreage was already dedicated to interstate commerce. In taking this action to "encourage full development of such acreage", the Commission stated its belief that its policy of distinguishing between new and old gas on the basis of contract date "had failed to achieve full development of dedicated acreage" (48 F.P.C. at 227). But it also emphasized that the optional procedure was "directed at supplies of gas not available to the interstate market prior to April 6, 1972. The rulemaking does not authorize rate increases for gas already flowing in interstate commerce through wells drilled prior to April 6, 1972 . . . [thus] consumers will not pay higher rates except for new supplies and then only to the extent that the contracting parties establish

on record that the price to be paid is required by the public interest" (48 F.P.C. at 220).

While the Commission continued to maintain the distinction between old and new gas, it recognized that situations would exist where increases in flowing gas rates could make additional gas available to the interstate market. Procedures for seeking such increases had been written into all of the area rate orders. See *Permian Basin Area Rate Cases, supra*, 390 U.S. at 770, 771. And upon proper showings the Commission has in fact granted substantial relief to producers. See, *e.g. Shell Oil Company*, 49 F.P.C. 108 (1973); *George Mitchell and Associates*, 49 F.P.C. 424 (1973). Moreover, on November 8, 1972 the Commission moved to institutionalize this procedure by the issuance in Docket No. R-458 of a proposed policy statement, subsequently finalized on April 23, 1973, to encourage producers to seek rate increases in excess of area flowing gas rates where reduced well pressure, need for reconditioning of wells, deeper drilling or other circumstances made additional production of existing wells uneconomic at existing flowing gas ceilings.[1] In short, as of the time of the initiation of the present proceeding, Commission procedures already existed whereby producers with flowing gas could secure higher rates, before or after the expiration of the initial sales contract, if and to the extent that they could show a need therefor to maintain or increase production. Such procedures were supported by New York and other consumer representatives, as proper exercises of the Commission's authority to "employ price functionally in order to achieve relevant regulatory purposes." (*Permian Basin Area Rate Cases, supra*, 390 U.S. at 797.)

[1] *Policy With Respect to Sales Where Reduced Pressure, Need For Reconditioning, Deeper Drilling or Other Factors Make Further Production Uneconomical at Existing Prices*, 49 F.P.C. 992 (1973), codified as 18 C.F.R. § 2.76.

On December 12, 1972, however, the Commission suddenly took a different tack. In Opinion 639, the Commission rejected a proposed higher new gas rate for the Appalachian Basin production area (supported by New York) in favor of individual producer utilization of the newly adopted "optional procedure" (See *supra*, p. 5), again stressing that this procedure would permit higher prices for new gas sales where they were instituted without increasing the rates for flowing gas. *Area Rates for the Appalachian and Illinois Basin Areas*, 48 F.P.C. 1299, 1307. However, by way of dictum the Commission stated that in view of its objections to "vintaging by contract date" it considered "vintaging to be an anachronism which we should now work to eliminate" (48 F.P.C. at 1309). Accordingly it indicated that it would henceforth adopt a literal interpretation of its various area rate orders under which sales of flowing gas would be eligible for the higher new gas rates where intial sales contracts had expired and the parties entered into new sales contracts.

The lawfulness *vel non* of this statement of policy was subsequently affirmed in *Shell Oil Company* v. *F.P.C.*, 491 F.2d 82 (5th Cir., 1974), as a permissible exercise of Commission discretion to interpret its own orders. However, the Court recognized the potential validity of the claims by New York and others that the gas supply objectives underlying the Commission's policy might be impaired rather than aided by the Commission's new policy, and made clear that its action was not to be taken as a blanket approval of all future actions by the Commission to eliminate vintaging; "in each future rate order the Commission must continue to produce substantial evidence to support each essential element of the proposed rate structure" (491 F.2d at 89-90).

B. The Instant Proceedings

On December 21, 1972, nine days after the issuance of Opinion 639, Mobil filed an application to abandon service it had been making pursuant to an expired contract with Shell Oil Company and to sell the gas to Texas Eastern Transmission Corporation at the established new gas price for the Texas Gulf Coast production area. Since the gas in question had been resold by Shell to Texas Eastern at the old gas price for the area, the effect of the series of transactions was to increase the price of the gas of Texas Eastern. Mobil supported its applications solely by reference to Opinion 639; the new contract it entered into with Texas Eastern did not commit Mobil to expend any of the additional revenues it would receive on new or expanded gas exploration, development or production efforts for Texas Eastern and nothing in the record before the Commission indicates that such expenditures would in fact be made. The applications were protested by AGD because of this deficiency. But the Commission by order of April 16, 1973, 49 F.P.C. 1009, summarily rejected the protest and approved the applications on grounds they were consistent with the policy it had enunciated in Opinion 639. AGD's petition for rehearing was similarly rejected out of hand. 49 F.P.C. 1411 (1973).

On March 20, 1973, the Commission gave notice of three rate increases filed by Continental Oil Company, Phillips Petroleum Company and Getty Oil Company, seeking in purported compliance with the Opinion 639 policy statement to secure the relevant area new gas rates for sales of flowing gas upon the expiration of the initial sales contracts and the entering into of new contracts at the higher new gas rate between the producer and the pipeline which had receiving service. Again there was no attempt by the producers to show that they had contracted to devote any of the increased revenues

in additional gas search efforts or contemplated doing so. However, despite protests by New York and AGD the Commission by order of April 27, 1973, accepted the rate increase filings and permitted them to go into effect without suspension solely on grounds that they were consistent with the Opinion 639 policy statement. Both New York and AGD filed petitions for rehearing. New York's petition for rehearing was summarily rejected by order of June 1, 1973. AGD's petition for rehearing was ignored by the Commission, but pursuant to Section 1.34 of its Rules of Practice and Procedure, 18 C.F.R. 1.34, was deemed to be denied by passage of time.

In the court below AGD's petition for review of the Commission's *Mobil* order (Case No. 73-1794) was consolidated for oral argument and decision with the petitions brought by AGD (Case No. 73-1793) and New York (Case No. 73-1647) from the orders in the Continental, Phillips and Getty proceeding. On January 27, 1976 the Court, with Judge Robinson dissenting, affirmed the Commission. See AGD Petition, Appendix A. The Court majority believed that the Commission could adopt a "literal" interpretation of its contract date distinction between old and new gas in its various area rate orders to achieve the gradual elimination of the two price system it had established in these orders, in view of the findings in Opinion 639 as to existing gas supply shortage, increased costs of finding and producing gas, and the alleged decline in production efforts under the existing rate structure.

Judge Robinson in his dissent pointed out that the adequacy of Commission's existing area rates (which have since been superseded by nationwide rates for new gas, including new wells on previously dedicated acreage, 17-34 cents per Mcf higher than when Opinion 639 was issued), was not involved in these proceedings.

The question instead was whether there was any basis for assuming that permitting producers to receive the higher new gas rate for low cost flowing gas whenever they entered into replacement contracts would be likely to result in substantial additional gas for the interstate market. As Judge Robinson pointed out that there were no Commission findings in either Opinion 639 or the orders approving the rate increases on this question. Nor was there any factual predicate in either the rule making proceeding leading to Opinion 639 or the individual rate increase cases from which it could logically be concluded that the producers would devote any significant percentage of the increased revenues they would secure for their flowing gas sales to additional efforts on behalf of the interstate gas consumers asked to pay the bill. In these circumstances he concluded that a departure from the two-price system approved by this Court in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 798 because it "will both provide a useful incentive to exploration and prevent excessive producer profits", to give the producers the new gas price for their oldest and lowest cost gas would not provide gas consumers with the "effective bond of protection from excessive rates and charges" which this Court in *Atlantic Refining Company* v. *Public Service Commission*, 360 U.S. 378, 388 (1959) found was a basic requirement of the Natural Gas Act.

REASONS FOR GRANTING THE WRIT

1. The issue in this case is whether the Federal Power Commission could properly interpret its outstanding area rate orders as authorizing producers to automatically secure the new gas price for their oldest vintages of flowing gas when the initial sales contract expired and the producer and pipeline entered into a new contract for the same service but at a higher rate.

The result of the Commission's action is similar to that subsequently incorporated into its nationwide producer rate order in Opinion No. 699-H in Docket No. R-389-B, which is the subject of pending petitions for certiorari filed by New York and AGD in case Nos. 75-1304 and 75-1305.[2] The present proceeding, however, is not subsumed by the Commission's subsequent action in the nationwide rate case. The Commission's nationwide rate order, though applicable to all "replacement contracts" entered into after January 1, 1973 (and those signed previous to that date with respect to initial sales contracts expiring on or after January 1, 1973) is effective only as of June 21, 1974. The present case will control the large number of increased rate filings and millions of dollars in rate increases which, like the specific filings involved in this case, were filed in the two year period between the Commission's enunciation of its policy in Opinion No. 639 and its opinions in Docket No. R-389-B.[3]

2. The orders under review do not purport to rest on any factual base other than that the producers entered into new sales contracts with the purchasing pipelines after the expiration of the initial sales contract and as such meet the requirements of the Commission's statement of policy enunciated in Opinion 639, *Area Rates for the Appalachian and Illinois Basin Areas*, 48 F.P.C. 1299, 1309-10 (1972), for qualifying for

[2] *Just And Reasonable National Rates For Sales Of Natural Gas From Wells Commenced On Or After January 1, 1973, And New Dedications of Natural Gas To Interstate Commerce On Or After January 1, 1973.* A similar issue is raised *inter alia* in the petition filing by the American Public Gas Association in case No. 75-1304.

[3] AGD and/or New York have intervened in protest to over 200 separate rate increase filings before the Commission involving replacement contracts, and review proceedings of all Commission orders permitting such increases on the basis of the Opinion 639 policy statement are pending in the Court of Appeals for the District of Columbia Circuit.

the area new gas rates. Specifically, there is no suggestion that any of the producers committed themselves to any new efforts to develop or produce additional gas for the interstate market as consideration for the higher rates afforded them by the new contracts.[4] Nor were there any Commission findings in Opinion 639 that a "literal" interpretation of previous area rate orders, in direct opposition to their stated intent,[5] to permit producers to secure the higher new gas rate for a sale of flowing gas whenever they enter into replacement contracts, would be likely to result in any substantial increase in the gas supplies made available to the interstate market, to say nothing of increased supplies commensurate with the increased costs to consumers. Moreover the contentions by New York and AGD that the Commission's policy would be counter-productive unless the producers were required to demonstrate their willingness to expend some or all of the increased revenues on additional efforts on behalf of the interstate market were ignored by the Commission.

The majority of the court below, while recognizing the speculative nature of the Commission's action, thought the factual predicate necessary to support the Commission's orders could be found in its findings in Opinion 639 that there was a substantial shortfall of natural gas supplies for the interstate market, which the existing area rates had been unable to cure, plus certain indications that exclusive reliance upon vintaging by contract date would impair new drilling on committed acreage. Assuming the existence of a factual

[4] The expiration of the initial sales contract would not authorize the producer to cease service to the pipeline in accordance with its outstanding certificate. See *Sun Oil Company* v. *FPC*, 364 U.S. 170 (1960).

[5] See *Permian Basin Area Rate Cases*, 390 U.S. 747, 795-798 (1968).

predicate in the record of the rule making proceeding which led to Opinion 639 (which was not directed to the question of the rate treatment of gas sold under replacement contracts), these findings merely establish the existence of a problem and do not in any way support the validity of the particular Commission solution thereof. See *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 396-399 (1974). As Judge Robinson's dissenting opinion below makes clear, considerably more is required by way of findings based on record data as to the likelihood that the increased rates for flowing gas will lead to new gas efforts for the interstate market before the Commission can provide producers with a multi-million non-cost allowance which, unlike the contingent escalations of flowing gas rates and refund work-off provisions of the Commission's order approved in *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 318 (1974) are not tied to the sale of new gas to the interstate market, or even to producer expenditures of additional exploration and development funds in the pipelines' behalf.

The possibility that vintaging by contract date could impair new drilling on acreage already dedicated to interstate commerce may justify granting the new gas rate for new wells drilled on such acreage, as the Commission subsequently concluded in establishing its nationwide just and reasonable rates for new gas in Opinion 699-H, *supra*, or granting increases in flowing gas rates justified by discrete drilling programs as the Commission provided in Order No. 481, 49 F.P.C. 992 (1973),[6] in accordance with a proposal outstanding as of the date it issued Opinion 639. But it does not

[6] *Policy With Respect to Sales Where Reduced Pressures, Need For Reconditioning, Deeper Drilling or Other Factors Make Further Production Uneconomical at Existing Prices.* The policy was incorporated into the Commission's Rules as Section 2.76, 18 C.F.R. § 2.76. See also *Shell Oil Company*, 49 F.P.C. 108 (1973).

justify providing higher rates for flowing gas without any showing that they will benefit the pipeline or its consumers. And even if the Commission prior to the establishment of any area rates had contemplated that the differential between flowing and new gas rates would eventually disappear, which it did not,[7] the Commission could not subsequently take this action unless it had a far better factual basis for believing that the large additional cost would benefit gas consumers. At a very minimum, since the Commission did not, as it could not, make such findings in its policy statement in Opinion 639, it could not permit individual increases to become effective pursuant to its policy where, as here, there was no showing made that the increased revenues would be utilized by the producers to augment the gas supply for the pipeline.

CONCLUSION

The Public Service Commission of the State of New York does not seek to freeze the rates at which producers sell natural gas to the pipelines serving the interstate market. Even with respect to flowing gas we are aware that there will be situations in which additional gas can or will be made available if the producer, as consideration for his additional efforts is afforded appropriate rate relief. But the Commission's policy to authorize producers to secure new gas rates

[7] For the proposition that it had expected the differential to wither away Opinion 639 cites (48 F.P.C. at 1309), the Commission's Statement of General Policy No. 61-1, 24 F.P.C. 818, issued in 1960 prior to the initiation of any area rate proceedings, where the Commission said it expected that the differentials between its "guideline" prices for initial certification of new gas sales and for accepting increased rate filings without suspension would disappear over a period of time. However, the different initial and increased rate guidelines established for most of the production areas, were unrelated to the date of original production or contractual commitment of the gas to the interstate market, or to the subsequent development of and rationale for the two-price area rate policy. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 759-60 (1968).

for their oldest and lowest cost flowing gas whenever they enter into replacement contracts with the pipeline, and without any showing that they will devote any of the increased revenues to the interstate market, is wholly unsupported by findings or record evidence as to the likelihood of producing substantial additional gas for the pipeline's customers. In fact, the policy is likely to be counter-productive since producers who might agree to further development efforts in return for increased rates are less likely to do so when they can secure the additional revenues without any additional effort.

The decision of the Court below is thus not only erroneous, but raises serious questions as to the proper administration of the Natural Gas Act warranting plenary review by this Court. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Nos. 75-1556 and 75-1565

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FEDERAL POWER COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Federal Power Commission established a two-tiered pricing methodology ("vintaging") for area gas rates in the Permian Basin Area Rate Proceeding of 1965.[1]

[1] *Permian Basin Area Rate Proceeding* (Opinion No. 468), 34 FPC 159, rehearing denied (Opinion No. 468-A), 34 FPC 1068, remanded *sub nom. Skelly Oil Co.* v. *Federal Power Commission*, 375 F. 2d 6 (C.A. 10), on rehearing, 375 F. 2d 35, reversed in part *sub nom. Permian Basin Area Rate Cases* (*Continental Oil Co.* v. *Federal Power Commission*), 390 U.S. 747.

The higher rate set a ceiling for "new" gas-well gas[2] dedicated to the interstate market after January 1, 1961, and was intended to stimulate exploration and development. A lower rate was set for "old" gas because the Commission concluded that price could not act as an incentive to further exploration and production[3] of such gas.

Experience did not bear out the Commission's expectations. Accordingly, in December 1972 the Commission issued Opinion No. 639,[4] which concluded that (48 FPC at 1309):

> Vintaging operates to discourage development of the full productive capacity of acreage committed to the interstate market, for even though such developmental drilling is undertaken at current costs, gas production obtained thereby is priced at the *lower* of two rates, when it is the *higher* of the two that is Commission-designed to provide the incentive for development of additional gas supplies [emphasis in original].

To help overcome this disincentive to full production of fields dedicated to the interstate markets, the Commission announced that the language of previous area rate orders which had established the two-tier pricing

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[2] "Gas-well gas" is gas produced by wells drilled for that purpose as distinguished from "oil-well gas," which is a by-product of oil production, and thus subject to different economic considerations. See *Permian Basin Area Rate Cases, supra,* 390 U.S. at 796.

[3] *Permian Basin Area Rate Cases (Continental Oil Co.* v. *Federal Power Commission), supra,* 390 U.S. at 796-797, 801-802.

[4] 48 FPC 1299, rehearing denied, 49 FPC 361, affirmed *sub nom. Shell Oil Co.* v. *Federal Power Commission,* 491 F.2d 82 (C.A. 5).

system would be "literally and strictly applied" (*id.* at 1310). Since those orders used the date of the gas contract to determine whether the gas was "old" or "new," Opinion No. 639 made clear that gas contracts signed after the designated area rate division date could receive the "new gas" rate even though the same gas service had existed under an earlier contract which had expired by its own terms. This would serve to abolish gradually the area two-tiered system.

On petitions for review, to which the petitioners here were parties, the United States Court of Appeals for the Fifth Circuit affirmed the Commission's interpretation of its vintaging regulation as "rational, reasonable, and therefore fully permissible." *Shell Oil Company* v. *Federal Power Commission*, 491 F. 2d 82, 89 (*Shell*).

In December 1972 Mobil Oil Company requested the Commission to authorize it to abandon certain natural gas sales to Shell Oil Company and approve a new contract to sell the gas in question to Texas Eastern Transmission Company. Mobil indicated that its Shell contract had expired by its own terms and, pursuant to Opinion No. 639, requested permission to collect the "new gas" rates for the gas to be sold to Texas Eastern. After permitting Associated Gas Distributors (AGD) to intervene, the Commission, on the basis of Opinion No. 639, approved the Mobil application. *Mobil Oil Corporation* (*Operator*), FPC Docket No. CI 73-450, CI 73-451, 49 FPC 1009.

Thereafter, a similar request for "new gas" area rates was filed by Continental Oil Company. The Commission permitted AGD and the Public Service Commission of the State of New York (PSCNY) to intervene and, on the basis of Opinion No. 639, accepted Continental's rate increase filings. *Continental Oil Company, et al.*, FPC Gas Rate Schedule No. 3 (AGD Pet. App. B, A-47 to A-49).

On petitions for review the court of appeals, with one dissent, affirmed the Commission's orders (AGD Pet. App. A, A-1 to A-46). It is this decision which petitioners now ask this Court to review.

Petitioners essentially contest the Commission's interpretation of its outstanding area rate orders as permitting "new gas" rates for production under contracts which are executed after the effective date of the area "new gas" rate, and which replace "old gas" contracts that have expired by their own terms. Petitioners see this as improperly allowing the gradual dissolution of "the two-tiered structure of rate regulation * * * " (AGD Pet. 8; see also PSCNY Pet. 10).

1. The permissibility of the gradual abolition of the two-tiered system through application of new rates to renewal contracts was decided adversely to petitioners in *Shell Oil Company* v. *Federal Power Commission (National Rate Case),* 520 F. 2d 1061, 1076-1078 (C.A. 5), certiorari denied *sub nom. The California Company, et al.* v. *Federal Power Commission,* No. 75-1289, June 14, 1976.[5]

As the court of appeals stated in the *National Rate Case* (520 F. 2d at 1077-1078):

> The Commission is not bound by its previous policies. As this Court and the Supreme Court have noted on various occasions, the rate structures which introduced or adjusted vintaging were experimental. It is necessary without a doubt that agencies be permitted latitude to evaluate old experiments and modify or abandon them when their best judgment requires such a course of action.

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[5]Both petitioners filed petitions for writs of certiorari in that case presenting essentially the same question raised here.

Moreover, because a *national* rate structure will in any event gradually replace the *area* rates at issue here, the gradual abolition of two-tiered *area* rates is of diminishing importance.

2. The precise question raised here and in the court of appeals below, the validity of Order 639, has also previously been decided adversely to petitioners. *Shell Oil Company* v. *Federal Power Commission, supra,* 491 F. 2d 82 (C.A. 5). As shown above, the Fifth Circuit in that case held that the Commission's "interpretation of its regulations' vintaging provisions is rational, reasonable, and therefore fully permissible" (491 F.2d at 89).

Petitioners' appeal to the Court of Appeals for the District of Columbia Circuit in this case presented the very question decided in *Shell, supra.* In its brief in the court of appeals here, which was filed before *Shell* was decided, PSCNY acknowledged that the sole issue here is the validity of Opinion 639, the very issue in *Shell.*[6] Petitioners, who were parties in *Shell*, should not be permitted to relitigate the issue in this case.

3. In any event the court of appeals here, as had the Fifth Circuit in *Shell,* correctly held that "[t]he Commission's interpretation of what constitutes 'new' gas,

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[6]In its initial brief in the court of appeals, PSCNY said (Br. 36):

> The sole issue presented by the Commission's present action in authorizing the rate increases is the validity of its "interpretation" of its own rules. If it properly held in Opinion No. 639 (upon which the Commission based its order under review) that a producer may receive the higher new gas area rate for gas committed to the interstate market in the distant past solely because its initial contract term has expired and it has entered into a new contract, then its action is valid and must be affirmed. If not, its action must be set aside.

and application of that interpretation in the present cases, were reasonable actions falling within its authority" (AGD Pet. App. A, A-11). As the court stated (AGD Pet. App. A, A-7):

> Unhappily, the Commission's creation, vintaging, failed to achieve the desired results. Opinion No. 639 contains "substantial evidence" to support that finding of failure, 15 U.S.C. §717r(b). As the court said in *Shell* (491 F. 2d at 85 n 8), "no fact findings are disputed." The Opinion No. 639 findings did in fact include detailed discussion of national gas supply, area gas drilling and production activities, intrastate competition for new gas, the need for deep gas exploration, comparison with costs of supplemental gas, and change in costs of finding and producing new gas supplies. A major fact finding, pointing toward the failure of vintaging, was that the exploratory gas well count in the area had been 97 wells in 1968 and that within one year after the issuance of Order No. 411 in 1970, applying the vintaging concept to the area, the exploratory gas well count dropped to 47 wells.

The court also weighed petitioners' concern as to "the likelihood that the increased rates for flowing gas will lead to new gas efforts for the interstate market" (PSCNY Pet. 13). The court concluded (AGD Pet. App. A, A-10):

> No one can say with certainty that additional gas revenues will lead to an increased gas supply. It is apparent, however, that without sufficient revenue to support exploration for new deposits and further development of old deposits, an increased quantum of such activity is unlikely. The evidentiary factors discussed in Opinion No. 639 support that conclusion.

> The Commission's action, in modifying its earlier intepretation of its own vintaging mechanism, followed a pragmatic, non-doctrinaire approach based on its experience and expertise.

In the *Permian Basin Area Rate Cases, supra,* 390 U.S. at 791-792, the Court set the standards of review of Commission orders. The order must not abuse or exceed the Commission's authority; every "essential element" of the order must be supported by "substantial evidence"; and the order must "reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors" for their risks, while simultaneously providing "protection to the relevant public interests, both existing and foreseeable." In *Mobil Oil Corporation* v. *Federal Power Commission,* 417 U.S. 283, 309, the Court added that:

> application of [these] three criteria of judicial review of Commission orders is primarily the task of the courts of appeals.

The Court noted that it would intervene to review Commission action only in the "rare instance when the standard [of *Permian*] appears to have been misapprehended or grossly misapplied." 417 U.S. at 310.

No such "rare instance" has been shown here. The court of appeals found that the Commission's orders were supported by "substantial evidence" and "were reasonable actions falling within its authority" (AGD Pet. App. A, A-7, A-11).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1976.

DOJ-1976-07

Nos. 75-1556 and 75-1565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND ASSOCIATED GAS DISTRIBUTORS,
Petitioners,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS CONTINENTAL OIL COMPANY, MOBIL OIL CORPORATION, AND PHILLIPS PETROLEUM COMPANY IN OPPOSITION TO PETITIONS

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BRIEF OF RESPONDENTS CONTINENTAL OIL COMPANY, MOBIL OIL CORPORATION, AND PHILLIPS PETROLEUM COMPANY IN OPPOSITION TO PETITIONS

Continental Oil Company, Mobil Oil Corporation, and Phillips Petroleum Company, intervenors in support of the respondent Federal Power Commission below and respondents here, submit this brief in opposition to petitions for writs of certiorari to review the judgment entered in these cases on January 27, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported (AGD App. A and Appendix to this Brief).[1] The Federal Power Commission orders issued April 16, 1973 and June 21, 1973 as to Mobil Oil Corporation are reported at 49 FPC 1009 and 49 FPC 1411; and the orders issued April 27, 1973 and June 1, 1973, as to Continental Oil Company and Phillips Petroleum Company are not reported (AGD App. B).

JURISDICTION

Petitioners properly invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

By the orders affirmed below, the Federal Power Commission authorized natural gas producers to receive Commission-prescribed ceiling rates for "new gas" for the producers' deliveries of natural gas under new contracts negotiated with pipeline purchasers to replace long-term contracts that had expired by their own terms. The maximum rates so allowed previously had been fixed by the Commission as "just and reasonable," after "adjudicatory-type" hearings under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d, in area rate decisions affirmed by the Courts;[2] and the specific orders on review also were based upon Commission interpretations of its regulations and policy statements in an area rate decision which has been affirmed on judicial review.[3] The questions presented are:

1. Whether the rational bases, substantial evidence, and conclusions supporting the Federal Power Commission's area rates, interpretations of its regulations, and policy statements set forth in the Commission's area rate decisions may be re-examined or overturned collaterally in subsequent review of specific orders implementing provisions of those Commission decisions, regulations, and statements of policy.

2. Whether the Commission's decision to allow the previously prescribed "just and reasonable" rates for deliveries of natural gas under new contracts replacing contracts which have expired by their own terms is an interpretation of regulations and expression of policy which the Commission is authorized to make under the Natural Gas Act.

3. Whether the Commission's decision to allow the "new gas" ceiling rate for deliveries under new contracts is rational and properly supported by Commission area rate decisions affirmed by the Courts.[4]

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[1] References are to the Appendices in the Petition of Associated Gas Distributors (AGD) in No. 75-1565. However, part of the majority opinion below does not appear in the AGD Appendix (see p. A-10 *et seq.*). Therefore, the last page of the opinion of the majority below, omitted by AGD, is reproduced as Appendix A to this brief.

[2] As to Mobil, the ceiling rates were prescribed by the Commission's Texas Gulf Coast Area Rate Opinion No. 595, ultimately affirmed in *Public Service Commission for the State of New York* v. *Federal Power Commission*, 516 F.2d 746 (D.C. Cir. 1975); and as to Continental and Phillips, the ceiling rates were prescribed by the Commission's Other Southwest Area Rate Opinion No. 607, affirmed in *Shell Oil Company* v. *Federal Power Commission*, 484 F.2d 469 (5th Cir. 1973), *cert. denied sub nom., Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 973 (1974).

[3] Commission policies and interpretations involved first were stated in Commission Opinion No. 639, affirmed in *Shell Oil Company* v. *Federal Power Commission*, 491 F.2d 82 (5th Cir. 1974).

[4] These respondents do not agree that these cases present the questions stated by Petitioner in No. 75-1556, and further note that the Petition filed by Associated Gas Distributors in No. 75-1565 fails to state any questions to be considered by this Court in light of this Court's Rule 23-1(c).

STATUTES INVOLVED

Statutory provisions involved are Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d (AGD App. C).

STATEMENT OF THE CASE

These cases involve orders of the Federal Power Commission accepting for filing under Section 4 of the Natural Gas Act changes of rates submitted in accordance with Commission area rate decisions, interpretations of regulations, and statements of policy which have been affirmed by the Courts of Appeals in other cases. Brief reference thus must be made to the context in which the specific orders were issued and these cases reached the courts:

1. *The "Two-Price" System of Area Rates.* In 1960, the Commission initiated a "two-price" system of guideline rates as the basis of the area rate system of regulation of natural gas producers. *Statement of General Policy No. 61-1*, 24 FPC 818 (1960). One set of guidelines applied to rate increases for existent contracts under Section 4 of the Act, and another set of higher guideline prices applied to review of initial prices in new contracts submitted with applications for certificates under Section 7 of the Act. At that time, the Commission stated:

> "Initial prices in new contracts are, and in many cases by virtue of economic factors, must be higher than the prices contained in old contracts. For this reason, we have found it advisable to adopt two schedules of prices, one pertaining to initial prices in new contracts and one pertaining to escalated prices in existing contracts. It is anticipated that these differences in price levels will be reduced and eventually eliminated as subsequent experience brings about revisions in the various areas." (24 FPC at 819).

Thereafter, in the area decisions issued in the 1960s and early 1970s, the Commission prescribed a two-tier system of area rates. See *Permian Basin Area Rate Proceeding*, 34 FPC 159 (1965), and *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). Maximum ceiling rates were prescribed for so-called "flowing gas," and higher maximum ceiling rates were prescribed for so-called "new gas." The division between the two classifications was determined by the date of contract between the producer and the pipeline purchaser (*e.g.*, in *Permian*, sales under contracts dated prior to January 1, 1961, were classified as "flowing gas" sales, and sales under contracts executed on or after January 1, 1961, were treated as "new gas"). No express provisions in the regulations prescribed by the area rate decisions were addressed to classification of sales under a new contract which replaces the old contract which expires by its own terms.

The two-tier system was reviewed in *Permian*, and this Court found no fault with the Commission's intent to use price ". . . functionally, as a tool to encourage the production of appropriate supplies of natural gas" (*Permian*, 390 U.S. at 769). This Court concluded that the Commission had authority under the Section 4 "just and reasonable" standard to prescribe different prices ". . . if it has permissibly found that such differences will effectively serve the regulatory purposes contemplated by Congress" (390 U.S. at 797-798).

Subsequent area rate decisions including the two-tier system of area rates were affirmed by the Courts.[5]

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[5] See *Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 283 (1974); *Public Service Commission for the State of New York* v. *Federal Power Commission*, 516 F.2d 746 (D.C. Cir. 1975); *Hugoton-Anadarko Area Rate Cases*, 466 F.2d 974 (9th Cir. 1972); *Shell Oil Company* v. *Federal Power Commission*, 484 F.2d 469 (5th Cir. 1973), *cert. denied sub nom., Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 973 (1974).

2. *Commission Opinion No. 639.* Under the two-tier area rate system, an anomalous situation existed when a long-term contract expired. Under the Act, the producer-seller then had the rights to (1) file for unilateral rate increases, subject to Commission suspension, hearing, and decision under Section 4; or (2) file an application under Section 7(b) of the Act seeking "abandonment" of the sale, permitting sale to another interstate or intrastate purchaser.[6] At the same time, if the producer executed a new "replacement" contract, the producer undertook new obligations under an instrument obviously dated subsequent to cut-off dates used to classify "flowing gas" and "new gas" in the area rate decisions.

In 1972, the Commission reviewed this situation in the context of an area rate case in which both area and national data as to supply, drilling, costs, and related facts were considered. *Area Rate For Appalachian and Illinois Areas*, 48 FPC 1299, *reh. den.*, 49 FPC 361 (1973). In its Opinion No. 639, the Commission noted deficiencies in the existing area rate structure; the operation of the two-tier or "vintaging" system discouraged development of full productive capacity on committed acreage; declines in developmental drilling; and inequities in the "vintaging" system.

The Commission concluded that an immediate, required corrective step could be taken ". . . in the application of vintaging concepts by interpretation of the specific language used in setting vintage rates . . ." (48 FPC at 1310). The Commission referred back to its original intent in 1960 to phase-out the experimental two-price system and to language in subsequent area rate decisions. The Commission concluded that the rate for "new gas," previously prescribed as just and reasonable, should be

[6] See *United Gas Pipe Line Company* v. *Federal Power Commission*, 385 U.S. 83 (1966); *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 364 U.S. 137 (1960).

allowed if: (1) a long-term contract expires by its own terms; (2) the producer and pipeline purchaser negotiate a new, replacement contract; and (3) the producer files the new contract with the Commission as part of its rate schedule under Section 4 of the Act. The Commission stated:

> "We will, thereby, simply adhere to the plain meaning of Order 411, and other orders and opinions with similar language, as written. In time this will result in the elimination of a two-price system, a result we believe intended by the original authors of vintaging and a result we wholeheartedly endorse." (48 FPC at 1310).

The interpretation, policy, and decision were made applicable to all areas.

3. *Affirmance of Opinion No. 639.* New York, supported by AGD, sought reversal of Opinion No. 639 on a variety of grounds. However, the Fifth Circuit affirmed the opinion in its entirety, rejecting the attacks now asserted here by New York and AGD. See *Shell Oil Company* v. *Federal Power Commission*, 491 F.2d 82 (1974).

The Court of Appeals concluded that the Commission had proceeded after adequate notice to the parties, including New York, and without procedural error (491 F.2d at 87-88). After careful assessment of arguments of New York and AGD on the merits, that Court further concluded that the Commission had interpreted its regulations permissibly; the interpretation was consistent with the original 1960 policy statement; and the Commission's interpretation of its regulations was ". . . rational, reasonable, and therefore fully permissible." (491 F.2d at 88-89).

That Court then sustained Opinion No. 639 "in full" (491 F.2d at 90); and neither New York nor AGD

filed petitions with this Court seeking review of the Fifth Circuit's judgment.

4. *The Instant Cases.* The instant cases began in 1973, after issuance of Opinion No. 639, with separate filings by the three producers tendering new contracts replacing long-term contracts which had expired by their own terms, and seeking the previously determined just and reasonable "new gas" area rates for deliveries under the new contracts:

(1) Continental and Phillips filed such new contracts for sales to Tennessee Gas Pipeline Company in fields covered by the Commission's Other Southwest Area Rate Opinion No. 607 (AGD App. A-5); and

(2) Mobil filed a new contract for sales to Texas Eastern Transmission Corporation in a field covered by the Commission's Texas Gulf Coast Area Rate Opinion No. 595 (AGD App. A-4, A-5).[7]

After Commission notice of these filings, AGD and New York filed protests, were permitted to intervene, and urged rejection of the filings. Their objections were based on their objections to Opinion No. 639, then pending on review in the Fifth Circuit. By orders issued April 16, 1973 and April 27, 1973, the Commission overruled the objections, accepted the producers' filings, and authorized collection of the previously-determined just and reasonable area rates for "new gas" for the producers' deliveries under the new, replacement contracts (AGD App. A-47 - A-49; A-53 - A-56). New York and AGD then sought rehearing, which was denied by Commission orders issued June 1, 1973 and June 21, 1973 (AGD App. A-49 - A-53).

[7] In Mobil's docket, the new contract also eliminated Shell Oil Company as a "middle-man" seller between Mobil and Texas Eastern, and Shell already had executed and filed a new contract covering its own sales to Texas Eastern (AGD App. A-4).

New York and AGD then filed separate petitions for review in the Court of Appeals for the District of Columbia Circuit, which were consolidated for argument and decision (Nos. 73-1647, 73-1793, and 73-1794 below).

5. *The Court of Appeals Decision.* The Court of Appeals affirmed the Commission (AGD App. A-2 - A-10 and App. to this Brief), with Judge Robinson dissenting (AGD App. A-13 - A-46).

The majority traced the evolution of the "vintaging" system from the outset, through Opinion No. 639, to the filings made by Mobil, Continental, and Phillips in compliance with the Commission's regulations, policies, Opinion No. 639 and the prior area rate decisions (AGD App. A-3 - A-6). The Court then noted the Commission has a dual statutory function of guarding against "inflated rates" *and* assuring rates ". . . sufficient to encourage vigorous development of an adequate supply" (AGD App. A-6), and that

> "Unhappily, the Commission's creation, vintaging, failed to achieve the desired results" (AGD App. A-7).

The Court found that Opinion No. 639 contained "substantial evidence" to support that "finding of failure" and other evidence, including the decline in well-drilling, to support the Commission's conclusions in Opinion No. 639 (AGD App. A-7 - A-8). The Court stated its "full agreement" with the conclusions reached by the Fifth Circuit in that court's review of Opinion No. 639 in the *Shell* case, discussed *supra* (AGD App. A-8). The Court further observed that the instant cases do *not* involve an area rate order or a "proposed rate structure," but merely the allowance of the "new gas" rates previously fixed as just and reasonable on the basis of evidence, findings, and decisions in the area rate cases (AGD App. A-8 - A-9).

The Court also expressed agreement with analyses by the Fifth Circuit in *Shell*, including the references to arguments there by New York, and stated:

> "No one can say with certainty that additional gas revenues will lead to an increased gas supply. It is apparent, however, that without sufficient revenue to support exploration for new deposits and further development of old deposits, an increased quantum of such activity is unlikely. The evidentiary factors discussed in Opinion No. 639 support that conclusion. The Commission's action, in modifying its earlier interpretation of its own vintaging mechanism, followed a pragmatic, non-doctrinaire approach based on its experience and expertise. It is not illogical to believe that removal of the impediments can result in revival of the impeded activity" (AGD App. A-10).

The Court concluded:

> "As noted in *Placid*, *supra*, the distinction between 'old' gas and 'new' gas is artificial. We agree with the holding in *Shell* that the Commission cannot be charged with error because it chose a literal and strict interpretation of particular language in preference to another possible interpretation. The Commission's interpretation of what constitutes 'new' gas, and application of that interpretation in the present cases, were reasonable actions falling within its authority." (See App. to this Brief).

The petitions to this Court followed.

ARGUMENT

The petitions do not set forth questions, grounds, or reasons requiring or warranting review by this Court:

I. The Decision Below Rests Upon Proper Application of Standards and Principles of Review Applicable to Commission Orders Under the Natural Gas Act, as Expressed by This Court

Here, as in the Fifth Circuit and the court below, New York and presumably AGD seek review of questions as to (1) whether an agency's interpretation of its own regulations is "permissible" or within its "authority," (2) whether an agency's policy is "rational," and (3) whether specific rates are supported by "substantial evidence" even though those rates were found to be so supported and lawful in area decisions long since affirmed by the Courts of Appeals in cases that are final.

New York and presumably AGD thus seek review of questions this Court clearly has held to be within the responsibility of the courts of appeals under Section 19(b) of the Natural Gas Act,[8] and do so after both the Fifth Circuit and the District of Columbia Circuit have canvassed their objections thoroughly, found them without merit, and affirmed the Commission. See AGD App. A-1 - A-10; App. to this Brief; and *Shell Oil Company* v. *Federal Power Commission*, 491 F.2d 82 (5th Cir. 1974).

In *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), and *Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 283 (1974), this Court spelled out criteria for review of Commission rate orders that were followed below:

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[8] ***Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 283, 309-310 (1974).**

(1) The Commission's interpretations of its 1960 policy statements and the regulations prescribed by its area rate decisions were found to be permissible, rational, and within the Commission's authority (AGD App. A-9 - A-10 and App. to this Brief);

(2) The rationale for the Commission's decision to allow the previously-prescribed "just and reasonable" new gas rates for sales under new contracts replacing expired contracts was found to be reasonable and fully supported by "substantial evidence" underlying Opinion No. 639 (AGD App. A-7 - A-9); and

(3) The specific "just and reasonable" rates allowed for these sales by Continental, Mobil, and Phillips actually were prescribed by the Commission more than five years ago on the basis of "substantial evidence" in two area rate opinions, long since reviewed, affirmed, and final under decisions by the Courts of Appeals (see AGD App. A-8 - A-9; *Shell Oil Company* v. *Federal Power Commission*, 484 F.2d 469 (5th Cir. 1973) (Other Southwest Area), and *Public Service Commission for the State of New York* v. *Federal Power Commission*, 516 F.2d 746 (D.C. Cir. 1975) (Texas Gulf Coast Area).

Thus, each required base has been touched. There is no error or conflict below; and nothing in these cases presents a ". . . rare instance when the standard appears to have been grossly misapprehended or grossly misapplied" by a court of appeals, warranting intervention of this Court (*Mobil*, 417 U.S. at 309-310).

Indeed, New York and AGD now have been afforded two bites at the Commission's Opinion No. 639, and no court of appeals has found any merit in any of the contentions of New York and AGD. In the instant cases, New York and AGD thus mounted what actually was a collateral attack upon Opinion No. 639, already on review in the Fifth Circuit, and upon area rate decisions

already final. Having failed in the Fifth Circuit and failed to seek review of the central opinion involved, New York and AGD thus now seek piecemeal, collateral review of the same issues by a deluge of pleadings before the Commission and petitions to the courts of appeals, repeating tales that are now more than twice-told and now more than twice found faulty by the courts below.[9]

The instant cases thus present ministerial agency action implementing policies, regulations, and rates prescribed in other decisions, now fully considered and affirmed in other review proceedings. Such litigation should be brought to an end; neither the administrative process nor the judicial process is served by repetitious, collateral reviews of the same issues, case after case. The uncertainties over Commission policies, adverse to all interests, engendered by these steps should be ended by prompt denial of the petitions in these cases.

II. Commission Opinion No. 639 and the Orders in These Cases Are Lawful Exercises of Commission Authority, Are Rational, And Are Properly Supported

To the extent that New York and AGD seek review of the Commission's interpretation and application of its own regulations, there are no errors to be reviewed, as the Courts of Appeals have found (*Cf.* New York Pet., pp. 10-12; AGD Pet., pp. 8-11).

[9] In its later Opinion No. 699, the Commission has prescribed a new national rate structure including the same principles as to treatment of replacement contracts previously announced in Opinion No. 639. New York and AGD similarly attacked that opinion, but the Commission was affirmed in *all* respects. *Shell Oil Company* v. *Federal Power Commission*, 520 F.2d 1061 (1975), *reh. denied*, 525 F.2d 1261 (5th Cir. 1976), pets. for writs pending in Nos. 75-1289, *et al.*

First, in Opinion No. 639, the Commission found the original intent of its 1960 policy statement to call for subsequent phasing out of the two-price system and found that the literal language of its regulations, classifying sales by "date of contract," fully permitted authorizing the "new gas" rate for new contracts replacing expired contracts. In *Shell*, the Fifth Circuit canvassed the same historical and current materials and agreed with the Commission:

> "Significantly, in this policy statement the Commission indicated its intention eventually to use a unitary pricing system." (491 F.2d at 88)
>
> * * * * * *
>
> "We conclude that FPC is acting consistently with its original views on vintaging by phasing out that concept with a narrow interpretation of its existing regulations." (491 F.2d at 89).

And, the District of Columbia Circuit reached the same conclusion (AGD App. A-6 - A-8).

Second, New York and AGD contend that the orders in the instant case, and back of them Opinion No. 639, are unsupported, and do not rest upon required findings or "substantial evidence" (New York Pet., pp. 11-14; AGD Pet., pp. 8-11). Again, however, the Courts of Appeals reviewed the records and found adequate rationale, findings, and substantial evidence. In *Shell*, the Fifth Circuit had before it the record which produced Opinion No. 639, considered the same argument, found the Commission's actions ". . . rational, reasonable, and therefore fully permissible" (491 F.2d at 89), and found "substantial evidence" to be a question of reference to the area rate decisions (491 F.2d at 89-90). Similarly, the court below found "substantial evidence" in Opinion No. 639 to support the "finding of failure" of the vintaging system, still touted by New York and AGD; found the Commission's corrective steps fully supported; and made

the same reference to content of the area rate records (AGD App. A-7 - A-9).

Third, New York and AGD apparently seek what would be a self-defeating anomaly in administrative law: a requirement for repetition, by rote, of each and every finding from a basic opinion in each and every specific order evidencing agency action implementing the policies and decisions set out in that basic opinion. As to such arguments, the court below did review the basic opinion, as sought by New York and AGD through the vehicle of attacking implementing orders, but properly turned to that opinion and prior Commission decisions for rationale and support (AGD App. A-9 - A-10).

In sum, what New York, and presumably AGD, seek to posit as errors below actually are but criticisms of review procedures required below because of the collateral route chosen by New York and AGD for their second attack upon Commission Opinion No. 639.

III. New York and AGD Actually Seek Review of Agency Choices of Policy and Rate Design Correctly Upheld by the Courts of Appeals

New York and AGD apparently recognize that the current natural gas shortage requires an overhaul of the area rate structure, corrective action by the Commission, and continued use of price as an incentive and functional tool to increase natural gas production, as approved in *Permian* (New York Pet., pp. 13-14; AGD Pet., pp. 12-15). However, their disagreement with Commission choices and policy decisions does not rise to the level of questions for judicial review.

Thus, New York and AGD suggest that the Commission's policy as to replacement contracts should be modified to include features drawn from Commission Order No. 455 procedures, "special relief" procedures, or "plowback" formulae tied to forgiveness of refunds due for

past collection of excessive rates (New York Pet., pp. 12, 14; AGD Pet., pp. 12-15). New York and AGD miss significant distinctions: (1) these "plow-back" and special relief features are part of procedures and formulae either allowing or forgiving collection of rates *exceeding* the just and reasonable rates prescribed by Commission area decisions; but (2) the policy and rate design as to replacement contracts are for allowance of the *previously-prescribed* "just and reasonable" rate *within* the maximum ceiling rate structure. The analogy New York and AGD seek to draw thus is misplaced, as the Courts of Appeals recognized.

New York and AGD also seem to suggest that the Commission erred in seeking to solve the replacement contract problem on a generalized basis, through generally-applicable regulations, filing criteria, and previously-prescribed ceiling rates. The alternative they seem to suggest is a reversion to case-by-case hearings on individual contracts, an approach to producer rate regulation necessarily abandoned as administratively infeasible sixteen years ago. This, too, warranted little attention in the Courts of Appeals.

New York and AGD also are disturbed by the growing number of replacement contracts submitted to the Commission (New York Pet., 14; AGD Pet., pp. 13-15). These numbers should be a source of comfort, not of concern. What they show is that hundreds of expired contracts *are* being renegotiated; that producers thereby *are* undertaking new long-term obligations; that, in each such instance, there will be no application for "abandonment" under Section 7(b) of the Act; and that, in each such instance, instead of terminating leases and seeking all cessation of deliveries, the producer is undertaking to continue deliveries and sales to an interstate purchaser. These scores of new contracts thus are a ground to encourage the Commission's effort, not a reason to destroy it.

Lastly, New York and AGD, as usual, question the efficacy of the Commission's policies unless modified to include particular procedures and detailed restrictions advocated by them. On these points, neither producers nor the Commission can guarantee anyone that these policies or any number of replacement contracts will bring an end to natural gas shortages in New York or on the AGD systems. The truly relevant points are missed by New York and AGD, but were not missed by the Courts of Appeals. As perceived by the Fifth Circuit in *Shell*:

> "If the higher rates do stimulate production, the extra increment for flowing gas will supply needed capital for exploration and drilling. Precedent, moreover, supports the view that FPC does not necessarily create a windfall when it includes in the price of flowing gas an increment for further exploration and development. We approved in *SoLa II* a rate structure with just such an increment." (491 F.2d at 82).

And, as stated by the court below:

> "It is apparent, however, that without sufficient revenue to support exploration for new deposits and further developments of old deposits, an increased quantum of such activity is unlikely. * * * It is not illogical to believe that removal of impediments can result in revival of the impeded activity." (AGD App. A-10).

New York and AGD, nevertheless, persist in seeking further to impede required activity by asserting (1) their own erroneous interpretations of 1960 Commission policy statements, (2) their interpretations of Commission regulations which have been rejected by the agency and two Courts of Appeals, and (3) their own views, which already have failed, as superior to policies the Commission now has found to be in the public interest, with the approval of the Courts of Appeals, to seek to assure consumers an adequate supply of natural gas.

The petitions present no questions of law, and, plainly, no issues requiring review by this Court.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

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May 26, 1976

APPENDIX

APPENDIX A

(last page of opinion of Court of Appeals' majority opinion omitted from Appendix to Petition in No. 75-1565)

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> The gas industry is different from metropolitan transit in that it requires a constant infusion of entrepreneurship of the highest order if even basic public needs are to be satisfied. * * * On the other hand, we count upon persons who carefully weigh investment risks for our supply of natural gas. We think the Commission here, having calculated the dangers involved in allowing the gas supply to lapse, and the probabilities that its estimates might be too low, is justified in having added the small noncost factors it thought were necessary. It found that it needed to do so to protect the public interest and not to assure any rights of gas producers.

As noted in *Placid*, *supra*, the distinction between "old" gas and "new" gas is artificial. We agree with the holding in *Shell* that the Commission cannot be charged with error because it chose a literal and strict interpretation of particular language in preference to another possible interpretation. The Commission's interpretation of what constitutes "new" gas, and application of that interpretation in the present cases, were reasonable actions falling within its authority.

The orders under review are affirmed.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1556

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,
v.
FEDERAL POWER COMMISSION,
Respondent.

REPLY TO COMMISSION'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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REPLY TO COMMISSION'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Commission's Memorandum in Opposition to the Petitions for Certiorari in these proceedings, defends the Commission's action solely on the basis that it could "properly" interpret its area rate orders, in a manner directly contrary to their admitted intent,[1] in order to effectuate a gradual abolition of the two-vintage rate system established therein by making the new gas rates available to renewal contracts (FPC Memorandum, p. 4). The Public Service Commission of the State of New York (New York) has already pointed out in its petition (pp.

[1] See, *e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 795-799 (1968).

6-7, 13-14), that the records in both the Commission rate proceedings from which review was sought and in Docket No. R-371, *Area Rates for the Appalachian and Illinois Basin Areas*, leading to Opinion 639, 48 FPC 1299 (1972), upon which the Commission relied for its actions, are totally barren of any valid factual predicate for the elimination of the dual price system established in the area rate cases. Specifically, we pointed out that the Commission's only suggestion as to why the existing two-price system was counterproductive—that a distinction between old and new gas *based on contract date* might result in inhibiting new drilling on acreage already committed to the interstate market in the initial sales contract—not only *could* be cured by making the new gas rate applicable to all new drilling operations, but *had* been so cured, independent of Opinion 639, first in the Optional Procedure for Certificating New Gas Sales, 18 C.F.R. § 2.75, affirmed *Moss* v. *FPC*, 502 F.2d 461 (D.C.Cir., 1974),[2] and then in the Commission's nationwide new gas rates adopted in Opinion 699-H, *Just and Reasonable National Rates for Sales of Natural Gas from Wells Commenced On or After January 1, 1973, and New Dedications of Natural Gas On or After January 1, 1973*, —— F.P.C. —— (unreported) December 4, 1974, affirmed *Shell Oil Company* v. *FPC*, 491 F.2d 82 (5th Cir., 1974), certiorari denied, *sub nom.*, *The California Company, et al.* v. *FPC*, No. 75-1289, *et el.*, 47 L.Ed.2d 394 (June 14, 1976).[3]

[2] The one facet of the Commission's rule set aside by the Court of Appeals was subsequently approved by this Court in *FPC* v. *Moss*, 47 L.Ed.2d 186 (1976).

[3] See also, *Policy with Respect to Sales Where Reduced Pressure, Need for Reconditioning, Deeper Drilling or Other Factors Make Further Production Uneconomical at Existing Prices*, 49 F.P.C. 992 (1973). It should be noted that on June 29, 1976 the Commission adopted an order to implement this policy which, *inter alia*, requires producers seeking higher rates for flowing gas on grounds they can thereby enhance production for the interstate market to detail the cost of their proposed additional operations and the estimated result thereof. 41 F.R. 27828 (July 7, 1976). No such showing was required or forthcoming to secure the higher rates for replacement contracts involved in the present case.

The Court need not consider, however, whether the failure of the Commission's Memorandum or the Court below[4] to direct themselves to the record support for any elimination of rate vintaging would in the context of the millions of dollars involved itself warrant plenary review by this Court. For the Commission on July 7, 1976, less than two weeks after it filed its Memorandum in Opposition to Certiorari here, issued its Opinion No. 770 in Docket No. RM75-14, *National Rates for Jurisdictional Sales of Natural Gas Dedicated to Interstate Commerce On or After January 1, 1973, For the Period January 1, 1975, to December 1, 1976*. In this opinion the Commission, reversing its position adopted on December 4, 1974 in Opinion No. 699-H, *supra*, expressly concluded that it would not move towards the gradual abolition of rate vintaging. On the contrary, it established a four vintage price system.

Under this system (1) gas initially sold in interstate commerce on or after January 1, 1975 or from wells "commenced" on or after that date, would be eligible for a base price of $1.42 per Mcf, with automatic quarterly escalations commencing October 1, 1976 of an additional cent; (2) gas in interstate commerce initially sold, or from wells initiated between January 1, 1973 and December 31, 1974 would have a just and reasonable base price of $1.01 per Mcf, with no further automatic escalations; (3) flowing gas sold under renewal contracts at the ex-

[4] The Court of Appeals majority, in the portions of the opinion cited in the Commission's Memorandum, merely repeated the Commission's language about the alleged failure of a system distinguishing between new and old gas on the basis of contract date to consider the problems of expensive new drilling on dedicated acreage. The Court apparently failed to recognize that this problem had otherwise been cured by the Commission.

piration of initial sales contracts entered into prior to January 1, 1973 will be entitled to a 52 cent base price, with annual escalations of one cent per Mcf; and (4) all other flowing gas will, pursuant to the Commission's Opinion 749 issued on December 31, 1975,[5] receive a base price of 29.5 cents as of July 1, 1976. Pages 11-16 of Opinion No. 770 discussing the establishment of this four vintage policy are set out as an Appendix to this reply since the Opinion has not yet been reported.[6]

Under this latest Commission pronouncement, sales of flowing gas under renewal contracts will still be entitled to the various area new gas rates for the period commencing on the date when rate increases filed pursuant to the policy statement of Opinion 639 were permitted to become effective until June 21, 1974, the effective date of Opinion 699-H, and 52 cents per Mcf plus one cent annual escalations thereafter. But, there no longer can be any attempt to justify either action on grounds that the Commisson is properly moving to eliminate vintaging.

The Commission's right to eliminate rate vintaging is, however, the sole basis upon which the Commission now seeks to justify an action costing gas consumers millions of dollars without any demonstrable results in securing additional gas for the interstate market.[7] It is true that

[5] *Just and Reasonable National Rates for Sales of Natural Gas From Wells Commenced Prior to January 1, 1973*, Opinion No. 749, Docket No. R-478, issued December 31, 1975, (unreported).

[6] While Opinion No. 770 is subject to petition for rehearing and court review, it represents the present thinking of the Commission.

[7] In opposing the extension of the renewal contract concept in Opinion 699, New York expressly stated its belief that examination of the Commission's files would demonstrate little, if any, producer agreement to make additional expenditures in return for the pipeline agreeing to a replacement contract, but that pipelines would nonetheless be compelled to agree to new contracts at higher rates if they wished to purchase any additional gas from such producers. The Commission's decision in Opinion 699-H *supra* did not bother to respond, but the Commission's brief on review of that

the Court below speculated that the additional revenues flowing to the producers as a result of the Commission's largesse might result in a greater expenditure of funds in a gas search effort on behalf of the interstate market—despite the Commission's refusal to tie the increased rates to any additional expenditure or effort on the producer's part. The reason why the Commission properly does not attempt to rely upon such an argument in its Memorandum in Opposition here is clear. There is no record as to the need for additional revenues from flowing gas in the rulemaking proceeding leading to Opinion 639 which was concerned with a proposal to establish a higher rate for *new* gas from the discrete production areas. Moreover, the brief discussion of the matter in Commission Opinion 639 *supra*, 48 F.P.C. 1309-1310, is devoted solely to the alleged disincentives of the existing system of vintaging gas on a contract date basis and does not suggest that increased rates for flowing gas is justified as a revenue producing device.

In short, the only conceivable justification for the Commission's action here has now been effectively eliminated by the Commission's own action. Under these circumstances it would appear appropriate for the Court to grant certiorari, and to remand the case to the Court of Appeals with instructions to set aside the Commission's orders in question with directions for the producers to make appropriate refunds unless they are able to demonstrate that the pipeline and its customers have received, or will receive, discrete benefits commensurate with the increased revenues paid to the producers. At the very

opinion argued (erroneously in our view) that inadequate time had transpired to permit any evaluation of the effects of supplying the Opinion 639 policy. A year and a half later, in Opinion 770, the Commission still refrains from any evaluation of the effect of its replacement contract policy which had then been in effect for over three and one half years.

least, the Court should grant the petitions for consideration on their merits.

Respectfully submitted,

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August 16, 1976

APPENDIX

APPENDIX A

OPINION NO. 770

Docket No. RM75-14

NATIONAL RATES FOR JURISDICTIONAL SALES OF NATURAL GAS DEDICATED TO INTERSTATE COMMERCE ON OR AFTER JANUARY 1, 1973, FOR THE PERIOD JANUARY 1, 1975, TO DECEMBER 31, 1976

OPINION AND ORDER PRESCRIBING UNIFORM NATIONAL RATE FOR SALES OF NATURAL GAS DEDICATED TO INTERSTATE COMMERCE ON OR AFTER JANUARY 1, 1973, FOR THE PERIOD JANUARY 1, 1975 TO DECEMBER 31, 1976

(Issued: July 27, 1976)

Pages 11-16 read as follows:

C. *Policy Determinations*

After careful review and consideration of all the evidence submitted in this proceeding, we conclude that the new base national rate herein established for 1975-1976 biennium gas should be made applicable where:

(i) The sale is made from a well or wells commenced on or after January 1, 1975;

(ii) The sale is made pursuant to a contract for the sale of natural gas in interstate commerce for gas not previously sold in interstate commerce prior to January 1, 1975, except pursuant to the provisions of 18 C.F.R. §§ 2.68, 2.70, 157.22, or 157.29 (including sales made pursuant to those sections as modified by Federal Power Commission Order No. 491, *et al.*), or 18 C.F.R.

§ 2.75(n), where such a sale is initiated on or after January 1, 1975, provided that no certificate for the subject sale has been issued under the optional procedure (18 C.F.R. § 2.75).[23]

Rather than increasing the rate for new gas qualifying under Opinion No. 699-H to the rate level for post-January 1, 1975 gas, we believe that a separate rate determination is necessary to reflect the additional cost and productivity data gathered for the period from January 1, 1973 to December 31, 1974, and to reflect increased income taxes resulting from repeal of percentage depletion allowances.

Our decision to modify the policy set forth in Opinion No. 699-H,[24] with respect to the effective date on which gas initially qualifies for a new rate, is based on a determination that the increased costs of exploration and production and the decreased productivity of wells should only be reflected in the rates for the corresponding period, and not for a prior period. Since the attendant cost and productivity data for the 1973-1974 biennium can be considered separately, we have determined that the more recent 1975 data should only be considered prospectively and should not affect a 1973-1974 cost-based national rate. The $1.42 per Mcf rate prescribed herein reflects the current costs of finding and producing new gas and exceeds the rate necessary for the lower costs previously incurred in finding and producing gas qualifying under Opinion No. 699-H.

We are aware of the problems occasioned by the continuance of the vintaging concept. The Commission, however, has a responsibility to minimize severe and harmful

[23] 18 C.F.R. § 2.56a(a)(1)(i) and (ii).

[24] See Opinion No. 699-H, —— F.P.C. —— slip opinion at 50.

economic dislocation due to increased rates.[25] In light of the magnitude of the increase of the rate prescribed herein for post-January 1, 1975 gas over the revised rate for 1973-1974 biennium gas, the Commission must abandon its intended policy to establish a single uniform national rate for gas dedicated or wells drilled after January 1, 1973, and must vintage by a 1973-1974 cost grouping to preclude the exaction of excessive and unjustifiable economic rent from flowing gas.[26]

Although the Commission expressed concern in Opinion No. 699-H that such vintaging could discourage the dedication of new gas supplies to the interstate market,[27] we did not anticipate at that time such a dramatic increase in costs and decrease in productivity, necessitating the rate of $1.42 per Mcf.

The Commission also has considered factors other than the traditional cost-based formulary in establishing this rate. We have elicited comments as to the bearing intrastate prices should have on interstate rates and have considered these prices in establishing the rate. In addition, we have considered the Btu equivalency values of residual oil, distillate oil, crude oil, synthetic natural gas and liquefied natural gas. Accordingly, we believe that the price established herein for post-January 1, 1975 gas is sufficiently high to encourage dedication of additional supplies of natural gas to the interstate market and increased exploratory and production activity.

We are aware that the rate prescribed herein for post-January 1, 1975 results in a 173% increase over the base

[25] *Area Rates For The Appalachian And Illinois Basin Areas*, 48 F.P.C. 1299 at 1309-1310 (1972), *affirmed sub nom. Shell Oil Co., et al.* v. *F.P.C.*, 491 F.2d 82 (5th Cir. 1974).

[26] See Opinion No. 699-H, Concurring Opinion of Commissioner Smith —— F.P.C. ——, slip opinion at 4.

[27] See Opinion No. 699-H, —— F.P.C. ——, slip opinion at 50.

rate established in Opinion No. 699-H. However, this disparity is substantially lessened when actual costs for the 1973-1974 biennium are considered in lieu of the projected costs utilized in that proceeding.[28] While actual drilling costs for 1973 approximated those projections made in Docket No. R-389-B, the actual dry hole costs and successful well costs for 1974 were, respectively, 57% and 14% greater than those projected. The average 1973-1974 actual dry hole cost was 35% greater and the average actual successful well cost was 3% greater than the trended values used in Opinion No. 699-H. Similarly, exploration and lease acquisition expenditures were substantially greater than those projected while average productivity fell substantially below that used in Opinion No. 699-H. Moreover, it is necessary to make a rate adjustment for future production from the 1973-1974 wells due to the increased income taxes resulting from the repeal of the percentage depletion allowance.[29] When these and other adjustments are made to reflect actual costs and increased tax liability, the rate established in Opinion No. 699-H is increased to $1.01 per Mcf. The disparity between that rate and the rate prescribed for 1975-1976 biennium gas amounts to a 41% increase.

For these reasons, it is necessary to establish a new rate for gas from dedications and wells drilled on or after January 1, 1973 and prior to January 1, 1975. This rate would be applicable where:

(i) The sale is made from a well or wells commenced on or after January 1, 1973, and prior to January 1, 1975;

(ii) The sale is made pursuant to a contract for the sale of natural gas in interstate commerce

[28] See Exhibit 30, *infra*, for greater detail.

[29] See Int. Rev. Code of 1954, § 613A(b)(2), added by the Tax Reduction Act of 1975, P.L. § 94-12, 501.

for gas not previously sold in interstate commerce prior to January 1, 1973, except pursuant to the provisions of 18 C.F.R. §§ 2.68, 2.70, 157.22, or 157.29 (including sales made pursuant to those sections as modified by Federal Power Commission Order No. 491, *et al.*), or 18 C.F.R. § 2.75(n), where such a sale is initiated on or after January 1, 1973 and prior to January 1, 1975 provided that no certificate for the subject sale has been issued under the optional procedure (18 C.F.R. § 2.75).[30]

The rates prescribed herein will not apply to sales made pursuant to contracts executed prior to or subsequent to the expiration of the term of the prior contract where the sales were formerly made pursuant to the permanent certificates of unlimited duration under such prior contracts which expired of their own terms on or after January 1, 1973, or pursuant to contracts executed on or after January 1, 1973, where the prior contract expired by its own terms prior to January 1, 1973. Such sales will continue to be governed by the rate level, including appropriate annual escalations, prescribed in Opinion No. 699-H.[31]

Opinion No. 749[32] was issued by the Commission on December 31, 1975, establishing "just and reasonable" rates[33] for gas flowing in interstate commerce prior to January 1, 1973. In that proceeding a comprehensive review of rates for such gas was made which resulted in

[30] 18 C.F.R. § 2.56a(a)(3)(i) and (ii).

[31] 18 C.F.R. § 2.56a(a)(4) and (5).

[32] See Footnote 3, *supra*.

[33] Sections 4(a) and 5(a) of the Natural Gas Act, require that all rates received by a "natural gas company" be "just and reasonable." 52 Stat. 822, 823 (1938); 15 U.S.C. §§ 717c(a), 717d(a), (1970).

the establishment of national rates. Rather than allowing flowing gas subject to expiring contracts to increase to the rate prescribed herein, we believe that the rate adjustment for such gas under expiring contracts should be limited to the rate level prescribed in Opinion No. 699-H.

Many comments have been received on this issue. Some advocate the continuance of the policy followed in Opinion Nos. 699 and 639 of allowing the renewal contract to receive the new gas rate upon expiration of the term of the prior contract. Other comments argue for the abandonment of this policy.

Our determination of this issue in this proceeding, however, is governed by different circumstances than those which existed when Opinion No. 699 was issued. In that proceeding, the underlying reason for allowing gas subject to expiring contracts the new gas rate was to insure that the additional revenues generated by this class of sales would be available for expanded exploration and development programs. The level of exploratory and developmental dollars generated by this treatment will remain the same as that found necessary in Opinion Nos. 699 and 699-H by permitting an increase to those rates rather than to the rates prescribed herein.

We have carefully scrutinized the disparity between new prices and old prices to avoid an unreasonable increase in rates. By permitting expiring contracts to increase to the rate established in Opinion No. 699-H, a large increase in rates for "flowing gas" is avoided[34] while additional revenues are insured for expanded exploration and development programs which are required to discover and produce new supplies of natural gas.[35]

[34] Over 500 Bcf of natural gas would fall into this category. This volume would significantly increase in future years.

[35] See Opinion No. 699, —— F.P.C. ——, slip opinion at 97.

Accordingly, a new national base rate of $1.42 per Mcf for post-January 1, 1975 gas and a revised rate of $1.01 per Mcf for 1973-1974 biennium gas will apply on or after the date of the issuance of this order. These rates are applicable to all qualifying sales of natural gas in interstate commerce, including oil-well (casinghead) gas, as well as gas-well gas, and shall remain in effect until modified by the Commission.

These rates are applicable only to jurisdictional sales of natural gas within the United States excluding Alaska and Hawaii ("the lower 48"). These national rates are subject to adjustment for Btu content, state and Federal production taxes, applicable gathering allowance, and the annual escalation provided herein.

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